Department of Labor and Industry
Board of Personnel Appeals
PO Box 201503
Helena, MT 59620-1503
(406) 444-2718

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF THE UNFAIR LABOR PRACTICE CHARGE NO. 37-2010

COLLEEN HANSEN Complainant, -vs- HELENA EDUCATION ASSOCIATION, MEA-MFT, Defendant,	)	INVESTIGATIVE REPORT AND NOTICE OF INTENT TO DISMISS

* *

I. Introduction

On April 15, 2010, Colleen Hansen, appearing pro se, filed an unfair labor practice charge with the Board of Personnel Appeals alleging that the Helena Education Association, MEA-MFT, hereinafter HEA or Association, violated section 39-31-402(b) MCA by refusing to process a grievance as well as "noncompliance with a Negotiated Grievance Process". The charge further alleges elements of restraint or coercion in the exercise of protected rights. Ms. Hansen further asks that the Board of Personnel Appeals "consider the issue of retaliation against me by the union as far back as 1992 with a Title IX complaint when HEA/MEA/MFT did not continue representation of my case as a condition for settlement with the other eleven Title IX claimants".

The Association was served with the complaint. Tammy Pilcher, President of the HEA as well as JC Weingartner, on behalf of MEA/MFT, answered the complaint and denied that either organization committed an unfair labor practice

John Andrew was assigned by the Board to investigate the charge and has communicated with the parties and exchanged information as necessary.

II. Discussion

In addressing the request that the Board consider the question of possible retaliation based on the Title IX complaint 39-31-404 MCA provides:

> **Six-month limitation on unfair labor practice complaint -- exception.** A notice of hearing may not be issued based upon any unfair labor practice more than 6 months before the filing of the charge with the board unless the person aggrieved was prevented from filing the charge by reason of service in the armed forces, in which event the 6-month period must be computed from the day of discharge.

When Ms. Hansen and other teachers in the Helena School District (District) filed their Title IX complaint the Association did settle the matter on behalf of eleven teachers. Ms. Hansen did not accept that settlement so she proceeded to federal court and, according to her, prevailed in that action. Clearly any action, or lack of action, on the part of the Association in 1992 is time barred in 2010 based on 39-31-404 MCA. Evidence relative to Ms. Hansen's current complaint can be relevant if it bears on the instant charge, Board of Personnel Appeals v Billings, 199 MT 302, 648 P2d 1169 (1982). To that extent events subsequent to 1992 could be considered from an evidentiary standpoint as they relate to the instant matter. In communication with the investigator Ms. Hansen explained that things have changed appreciably since 1992, and that this element of her complaint was more of a "feeling" there were lingering issues. Ms. Hansen did not point to any demonstrable actions by the Association to support her request that the Board consider the Title IX action and, in fact, her written response to the answer of the HEA was that,

> This past year's meetings with the Transition Team, and the Contract Maintenance Committee were not gender focused; however, the hostility and heavy handed treatment are not aligned with union respect.

In short, nothing offered to the investigator, and nothing discovered by the investigator while reviewing this complaint, lends credence to the argument that in some fashion the Association's actions were related to, or a continuation of attitudes related to the Title IX complaint. No merit to this portion of the complaint can be found. This leaves the other allegations of the complaint to be addressed.

At the heart of Ms. Hansen's complaint is the Significant Writing Program. The program as administered in the Helena school system is not captured in any portion of the collective bargaining agreement between the District and the HEA. Rather, the program is one that has evolved through time, has been subject to grievances in the past (under the broad range of issues that can be grieved under the collective bargaining agreement), and it is an element in the program that is the basis for the current complaint. Specifically, and as per Board of Public Education guideline 10.55.7130, the program calls for no more than 100 students per day for each English teacher in the District. In the past, this number has been exceeded and impacted several teachers with Ms. Hansen's class size exceeding 100 on three occasions according to her. It is the fact that her program exceeded the limit and the fact that the HEA did not process her most recent grievance over this issue that led to the unfair labor practice complaint.

The HEA does not determine class size. The District makes that determination so this is not a case where from the beginning the HEA has singled out Ms. Hansen for disparate treatment anymore than has the District, an allegation not made by Ms. Hansen. According to Ms. Hansen school counselors can impact the number of students, but again, there is no evidence that happened to any appreciable degree, and certainly not to the specific detriment of Ms. Hansen. According to Ms. Hansen, she was not the only teacher whose load exceeded 100 students and apparently more junior teachers were impacted as well as more senior teachers.

There are mechanisms, to be discussed later in this report, that through practice have evolved to mitigate the effect of student load on each teacher. The grievance process in the collective bargaining agreement has also come to bear in the past, and, in fact, the Superintendent has been involved in mitigating the impact of student load on teachers up to an including economic considerations for teachers as well as the English Department at Helena High School. Ms. Hansen contends that in her current complaint the provisions of the collective bargaining agreement were ignored by the HEA. The agreement provides in relevant part:

ARTICLE XV, 15.2, LEVEL ONE – INFORMAL PRINCIPAL/SUPERVISOR

a. The grievant shall, within fifteen (15) days of the teacher's first knowledge of the facts upon which the grievance is based, discuss it with the principal or supervisor with the objective of resolving the matter informally.

LEVEL TWO-FORMAL PRINCIPAL/SUPERVISOR

a. If the grievant is not satisfied with the informal disposition of the grievance, the grievant may file a written grievance with the principal within ten (10) days of the informal meeting. The principal shall have five (5) days in which to make a written response to the grievance. The response shall include the reasons upon which the decision was based.

b. Within five (5) days of receiving the principal's written decision, the grievant should either file a written appeal to the Superintendent, or the Superintendent's designee or notify the principal of the acceptance of the decision.

LEVEL THREE – SUPERINTENDENT

a. Such submission to the Superintendent or the Superintendent's designee shall include copies of all materials submitted or received at Level One. The Superintendent shall have the (10) days in which to investigate and hold hearings and submit a written response to the grievance.

b. The Superintendent shall, in all cases, within five (5) days, meet with the grievant in an effort to resolve the matter informally.

c, If the grievant is not satisfied with the disposition of the grievance at Level Three, the grievant may file the grievance with the Board of Trustees. The grievance shall be filed within five (5) days of receiving the written decision of the Superintendent.

The grievance procedure then goes on to define the role of the Board of Trustees and at Level Five, provides for final and binding arbitration.

It is the contention of Ms. Hansen that the Association did not follow these steps in the collective bargaining agreement, and as will be discussed below, in a separate agreement specific to the Significant Writing Program, and in doing so her rights were ignored.

In the school year 2001 the district exceeded the 100 student load. The matter was grieved by Ms. Hansen and resolution, with her approval, was reached on November 21, 2001. The settlement reached resulted in implementation guidelines for the Significant Writing Program. The 100 student load was reaffirmed as well as an average of 23 students per section of English taught per day. The settlement went on to provide that the District would strive to meet these goals and if the daily section count exceeded 23 per day, or 100 students total there would be a process involving the teacher, a representative of the HEA and the principal to resolve the issue. If resolution was not reached at the school level the issue would be referred to the superintendent and then, if need be, to the Labor Management Committee. Nothing in these guidelines precludes a teacher from filing a grievance under the collective bargaining agreement nor is there anything in the collective bargaining agreement that requires a teacher to follow the Student Writing Program implementation guidelines agreed to in 2001.

In the school year 2006 student load was exceeded. Ms. Hansen grieved the matter under the terms of the collective bargaining agreement rather than the guidelines set forth in 2001. When Ms. Hansen's grievance reached the Board of Trustees the Board rejected the grievance and told Ms. Hansen that under the grievance procedure of the collective bargaining agreement she needed to first appeal to the Superintendent. When the matter reached the Superintendent a resolution was reached and the issue resolved. Because of the route taken by Ms. Hansen in 2006, the Labor Management Committee referenced in the 2001 implementation guidelines was never involved in the resolution of this complaint.

It must be noted that in 2004, with implementation of the district Professional Compensation Alternative Plan a group called the Transition Team was formed to assist the District and its teachers in the moving from the traditional salary schedule to the alternative salary schedule. The Transition Team consists of five administrators and four Association members. The team uses a consensus approach to decision making and if one member does not concur with a proposed decision, the decision is not accepted. Along with this, the District and the Association have agreed that any decision made by the Transition Team is final. It must be noted that Ms. Hansen never opted to transition to the Professional Alternative Pay Plan so it is understandable why

she may not be aware of all the agreements between the District and the HEA concerning the roles and responsibilities of the Transition Team. Specifically, it is understandable that she was not aware that the Transition Team, through agreement between the District and the HEA, became the Labor Management Committee referenced in the 2001 implementation guidelines.

In the 2009-2010 school year student load for Ms. Hansen again exceeded 100 thus triggering a grievance by Ms. Hansen. At this point the two routes to resolve a "grievance" come to bear. As the 2001 implementation guidelines evolved the Transition Team became the Labor Management Committee to resolve Significant Writing Program issues. That is what happened. The Transition Team addressed the issue and among other remedies directed that each teacher receive $150 per classroom per semester or two professional leave days per semester. Ms. Hansen is particularly concerned that the Transition Team was used rather than the traditional Labor Management Committee and that in some way this was contrary to the grievance procedure. However, the reality is that use of the Transition Team is precisely what the HEA and the District agreed upon. Moreover, while Ms. Hansen may argue that there is disproportionate representation on the Transition Team that favors management the fact remains that in the consensus decision making model that team uses, any dissent by any member of the team means there is no decision. Regardless of how she argues the point, Ms. Hansen was not prejudiced or unfairly represented by the HEA for what occurred when the evolved 2001 guidelines were followed. Suffice to say, however, she was not satisfied with the fact that the District again exceeded student loads, but most relevant to her complaint, she was not satisfied with the resolution reached using the 2001 implementation guidelines.

The above in mind, one must now turn to the grievance procedure under the collective bargaining agreement as did Ms. Hansen. The agreement in question is a contract between the District and the HEA. As such the HEA has control over what is grieved and what can, and cannot, proceed under the grievance procedure. Ms. Hansen argues that, "This year, for the first time, I was not allowed to pursue the entire grievance process".

In administering the grievance procedure the HEA has long utilized a Contract Maintenance Committee. Pursuant to HEA policy the Contract Maintenance Committee administers all grievances attaining Level Two and above. Pursuant to established policy of the HEA, and even though all timelines for appeal had arguably passed, Ms. Hansen was afforded full opportunity to plead her case through established HEA practice up to and including the HEA Board of Directors. That Board, on March 16, 2010, denied Ms. Hansen's request to move her grievance forward leading to the current charge by Ms. Hansen.

The Montana Supreme Court has approved the practice of the Board of Personnel Appeals in using Federal Court and National Labor Relations Board (NLRB) precedent as guidelines in interpreting the Montana Collective Bargaining for Public Employees Act, State ex rel. Board of Personnel Appeals vs. District Court, 183 Montana 223 598

P.2d 1117, 103 LRRM 2297; Teamsters Local No. 45 vs. State ex rel. Board of Personnel Appeals, 185 Montana 272, 635 P.2d 185, 119 LRRM 2682; and AFSCME Local No. 2390 vs. City of Billings, Montana 555 P.2d 507, 93 LRRM 2753. Thus, to the extent cited in this decision, federal precedent is considered for guidance and to supplement state law when applicable.

Failing to process a grievance, or failure on the part of a union to take a grievance to final and binding arbitration, can be a breach of the duty of fair representation, the basis of Ms. Hansen's complaint. As the U.S. Supreme Court has held, the duty of fair representation does not require that all grievances be taken to arbitration.

> "Though we accept the proposition that a union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion we do not agree that the individual employee has an absolute right to have his grievance taken to arbitration regardless of the provisions of the applicable collective bargaining contract." Vaca v. Sipes, 386 U.S. 171, 64 LRRM 2369 (1967)

Moreover, the duty of fair representation does not limit the legitimate right of the union to exercise broad discretion in performing its duties because "union discretion is essential to the proper functioning of the collective bargaining system." International Brotherhood of Electrical Workers v. Foust, 442 U.S. 42 (1979).

A union violates its duty of fair representation to the employees it represents only if its actions are "arbitrary, discriminatory or in bad faith . . ." Vaca v. Sipes, supra. To determine if the duty to fairly represent has been breached each element in the three part standard must be examined, Airline Pilots Ass'n, Int'l v. O'Neill, 499 U.S. 65, 77 [136 LRRM 2721] (1991). The Board of Personnel Appeals has adopted the Vaca standard and in Ford v. University of Montana and Missoula Typographical Union No. 277, 183 MT 112, 598 P.2d 604, (Mont 1979) the Montana Supreme Court in reviewing an unfair labor practice charge brought before the Board held:

> In short, the Court has to find that the Union's action was in some way a product of bad faith, discrimination, or arbitrariness. The mere fact that Bonnie Ford disagrees with the decision of the Union [in determining that her grievance was without merit] is not sufficient basis for a finding of breach of the duty of fair representation absent these factors.

The HEA did not act arbitrarily in what it did in processing Ms. Hansen's grievance. She was afforded full opportunity to argue her case before the Association as to why her grievance should proceed forward. For want of a better description, due process was fully afforded by the Association and there is nothing before the investigator which indicates the Association was arbitrary in its actions. In fact, one comment in the deliberations of the Contract Maintenance Committee procedure is that "Colleen could propose to the Ongoing Bargaining Committee to make Significant Writing a part of our negotiated agreement". This, as one example, shows that Ms. Hansen's grievance was not only properly considered by the Association, but it shows an awareness that, perhaps, if there were more uniform, or consistent methodology to handle student load

in Significant Writing, maybe situations like this could be avoided, or at the least, more easily and consistently resolved. This is not an observation made in an arbitrary fashion. Instead, it shows keen awareness of some difficulties in resolving excess student load in the Significant Writing Program.

In terms of the second element of the test, discrimination, there simply is nothing before the investigator to substantiate any basis for it. If anything the information reviewed demonstrates just the opposite, particularly when viewed in the light of the Title IX complaint.

Addressing the third element of the test, bad faith, bad faith on the part of the HEA simply is not shown. If anything, what comes through is that since she did not elect to switch to the Professional Compensation Alternative Plan, Ms. Hansen may not have been aware of some of the changes that ultimately affected her. None of this was done in bad faith anymore than was the understandable confusion that can result when there are two avenues to resolve workplace issues such as student load. In all cases, the good-faith conduct of a union is preserved unless it can be demonstrated that the conduct is sufficiently outside a "wide range of reasonableness" so as to be considered irrational. To establish a lack of good faith there must be evidence of fraud, deceitful action, or dishonest conduct by the union, Schmidt v. Electrical Workers (IBEW) Local 949, 980 F.2d 1167, 141 LRRM 3004 (8th Cir. 1992) and Aguinaga v. Food & Commercial Workers, 993 F.2d 1167, 143 LRRM 2400 (10th Cir 1993) Cert. Denied 510 U.S. 1072, 145 LRRM 2320 (1994). And, as the Ninth Circuit held, there is a mandated deferential standard of review in evaluating union actions and they can be challenged successfully only if wholly irrational and even "unwise" or "unconsidered" union decisions will not rise to the level of irrational conduct, Stevens v. Moore Bus. Forms, 18 F3d. 1443, 145 LRRM 2668 (9th Cir. 1994). Here there is no evidence of bad faith, fraud, deceitful action, or dishonest conduct on the part of the HEA, MEA-MFT.

III. Recommended Order

It is hereby recommended that Unfair Labor Practice Charge 37-2010 be dismissed as without merit.

DATED this 26th day of May 2010.

BOARD OF PERSONNEL APPEALS

By: _____
John Andrew
Investigator

NOTICE

Pursuant to 39-31-405 (2) MCA, if a finding of no probable merit is made by an agent of the Board a Notice of Intent to Dismiss is to be issued. The Notice of Intent to Dismiss may be appealed to the Board. The appeal must be in writing and must be made within 10 days of receipt of the Notice of Intent to Dismiss. The appeal is to be filed with the Board at P.O. Box 201503, Helena, MT 59620-1503. If an appeal is not filed the decision to dismiss becomes a final order of the Board.

* * * * * * * * * * * * * * * * * * * *

CERTIFICATE OF MAILING

I, _____ , do hereby certify that a true and correct copy of this document was mailed to the following on the _____ day of _____ 2010, postage paid and addressed as follows:

COLLEEN HANSEN
241 ANDERSON BLVD
HELENA MT 59601

TAMMY PILCHER
HELENA EDUCATION ASSOCIATION
1232 EAST 6TH AVE
HELENA MT 59601

JC WEINGARTNER
MEA MFT
1232 EAST 6TH AVE
HELENA MT 59601